line of cleavage seems extremely vague in modern warfare, and the distinction, therefore, hardly practicable.

LIBEL AND SLANDER—QUALIFIED PRIVILEGE—PUBLIC OFFICIALS.—The defendant, a newspaper corporation, published articles charging the plaintiff,a penitentiary warden, with mismanagement of the state penitentiary and brutal treatment of prisoners. The plaintiff brought an action for libel. *Held,* the plaintiff cannot recover. *McClung* v. *Pulitzer Publishing Co.* (Mo.), 214 S. W. 193.

At common law, before recognition of the doctrine of the "freedom of the press," there existed no privilege of discussion or criticism of governmental officials. See *Queen* v. *Tutchin,* 14 How. St. Tr. 1095. In both England and America, however, the present rule is that fair comment on the public acts of public officials is qualifiedly privileged. *Diener* v. *Star Chronicle Co.,* 230 Mo. 613, 132 S. W. 1143, 33 L. R. A. (N. S.) 216. See *Burt* v. *Advertiser Newspaper Co.,* 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97.

The privilege of fair comment embraces the right to express honest opinions upon, and to draw just and reasonable inferences from, the facts. *Cook* v. *Pulitzer Pub. Co.,* 241 Mo. 326, 145 S. W. 480. According to the great weight of English and American authority, the qualified privilege rule, while extending protection to comment made in good faith, even though it be mistaken in opinions or inferences, does not grant immunity to false statements of fact. *Davis* v. *Shepstone,* L. R., 11 App. Cas. 187, 50 J. P. 709, 55 L. J. P. C. 51; *Hallam* v. *Post Pub. Co.,* 55 Fed. 456; *Williams Printing Co.* v. *Saunders,* 113 Va. 156, 73 S. E. 472; *Bronson* v. *Bruce,* 59 Mich. 467, 126 N. W. 671, 60 Am. Rep. 307. But it is held in some states, because of the public interest of the subject matter, that false statements made in comment on public affairs are privileged when there is honest belief in their truth and probable ground for such belief. *Coleman* v. *MacLennan,* 78 Kan. 711, 98 Pac. 281, 130 Am. St. Rep. 390, 20 L. R. A. (N. S.) 361; *Briggs* v. *Garrett,* 111 Pa. St. 404, 2 Atl. 513, 56 Am. Rep. 274. The former doctrine, clearly maintaining the distinction between comment proper and statement of fact, is sounder on principle and from considerations of public policy. See treatise by Judge Veeder, 23 HARV. LAW REV. 413.

The qualified privilege is destroyed by proof that the publication was inspired by actual or express malice. *Tyree* v. *Harrison,* 100 Va. 540, 42 S. E. 295. See *Chaffin* v. *Lynch,* 83 Va. 106, 1 S. E. 803, (an action brought under the so-called "Anti-Dueling Act"). Express malice, in this sense, is defined as an "indirect and wicked motive which induces the defendant to defame the plaintiff." See *Hemmens* v. *Nelson,* 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440, citing ODGERS, LIBEL AND SLANDER, 267. After qualified privilege has been established by the defendant, the burden of proving actual malice rests upon the plaintiff. *Strode* v. *Clement,* 90 Va. 553, 19 S. E. 177.

The question whether a publication is qualifiedly privileged, where there is no controversy as to the circumstances under which it was made, is for the court to determine. *Williams Printing Co.* v. *Saunders, supra.* But whether or not the publication was actuated by malice, is a

question of fact for the jury. *Farley* v. *Thalhimer*, 103 Va. 504, 49 S. E. 644. It is, however, the province of the court to decide whether there is sufficient evidence of malice to send the case to the jury, and when there is not, it must direct a nonsuit or verdict for the defendant. See *Neeb* v. *Hope*, 111 Pa. St. 145, 2 Atl. 568.

The holding in the instant case is in line with the overwhelming current of modern authority and seems eminently sound on reason.

MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—"EMPLOYED IN INTERSTATE COMMERCE."—The plaintiff was employed by the defendant as a cook in connection with a gang of bridge carpenters engaged in repairing a bridge used by interstate trains. While preparing a meal in the camp car on a siding, he was injured by a collision. Claiming to have been engaged in interstate commerce, he brought this action under the Federal Employers' Liability Act. *Held,* he is entitled to recover. *Philadelphia, B. & W. R. Co.* v. *Smith*, 39 Sup. Ct. 396.

This important decision has attracted comment, since it clearly broadens the usual interpretation of the Federal Statute. (35 Stat. 65, 8 Comp. Stat. '16, §§ 8657-8665.) The following cases show that the carpenters above were "engaged in interstate commerce," but no previous cases go so far as to include independent sub-assistants in the same category.

Attempts at a true test have been made. To be within the Federal Employers' Liability Act, one need not be directly engaged in interstate train movement, the test being whether one's task is so directly and immediately connected with it as to form a part, or a necessary, though preliminary, incident, thereof. *Cincinnati, N. O. & T. P. R. Co.* v. *Morgan*, 139 Tenn. 27, 201 S. W. 128; *Ohio Valley Elec. R. Co.* v. *Brumfield*, 180 Ky. 743, 203 S. W. 541. And an employee may be "engaged in interstate commerce" while performing a task in connection with a locomotive which has completed an interstate journey and been uncoupled from the train. *Garber* v. *Missouri Pac. R. Co.* (Tex.), 210 S. W. 377. The work must have a real and substantial connection with interstate commerce. *Benson* v. *Bush* (Cal.), 178 Pac. 747; and see valuable references in the same case. The performance of the act in which the employee is engaged must *directly* and *immediately* tend to facilitate movement of interstate commerce, or conversely, its omission must directly interfere with or hinder movement of such commerce. *Morrison* v. *Chicago, M. & St. P. R. Co.*, 103 Wash. 650, 175 Pac. 325. Thus, the work of keeping in repair tracks, roadbed, bridges and other instrumentalities used in interstate commerce, brings those engaged upon it within the meaning of the words, "engaged in interstate commerce." See *Pederson* v. *Delaware, etc., R. Co.*, 229 U. S. 146, Ann. Cas. 1914C, 153.

A gateman employed, by a railroad operating interstate and intrastate trains, to facilitate both kinds of traffic by keeping its tracks clear at a certain point, was killed by an intrastate train while he was backing a horse away from the tracks in order to permit the lowering of a gate. It was held that he was "engaged in interstate commerce." *Southern Pacific Co.* v. *Industrial Accident Commission*, 174 Cal. 8, 161